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May 28, 1998

VIA FEDERAL EXPRESS

Joan Johnson, Esquire
United States Environmental Protection
Agency, Region III
841 Chestnut Building
Philadelphia, PA 19107

**Re: Comments Regarding Malvern TCE
 de minimis Settlement Consent Order**

Dear Ms. Johnson:

This constitutes comments from the Malvern TCE de minimis Group regarding the Draft Administrative Order on Consent provided to the de minimis parties last month. As you know, we represent approximately forty (40) de minimis parties regarding settlement at the Malvern TCE Site. These comments are submitted on behalf of those parties. As an initial matter, we are disappointed with EPA's failure to consider the materials we discussed with you last month. Nevertheless, the group is interested in pursuing a settlement

I. PARTICIPATION OF PENNSYLVANIA DEP

As you no doubt are aware, the Pennsylvania Department of Environmental Protection has conducted sampling activities with regard to the Site. I do not at this time know whether there were additional actions taken by DEP or whether there was a state share contributed to the cleanup. The de minimis group is interested in including the Commonwealth of Pennsylvania in any Administrative Order or Consent Decree.

Also, please let me know if Pennsylvania has received notice of this settlement, and has elected not to pursue claims. This information would also be valuable in our assessment of whether or not the settlement is appropriate.

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II. SETTLEMENT "PRICE" BASIS

As you know from our meeting last month, the Malvern de minimis potentially responsible parties have significant concerns regarding the projections of response costs in connection with the remediation of the Site. Those concerns are significant. These objections take several forms:

A. Lack of a Chemcene Share.

The settlement is troubling for several reasons related to Chemcene and its position. EPA made adjustments in the remedy on-site and identified risks in the risk assessment based on the continued Chemcene operations. It is our belief that EPA has authority to close operations that are either polluting facilities or if the public health would be benefited. Chemcene is a facility that has a track record of non-compliance. However, EPA is allowing Chemcene to remain in business and has accommodated its business.

It appears that there are a number of costs which relate to the continued operations of Chemcene which should not be the responsibility of the de minimis parties. EPA has not accounted for these costs in its settlement proposal.

B. Chemcene's Share

Court decisions, such as Judge Conaboy's decision in Gould v. A&M Battery, 1997 U.S. Dist. 15708 (M.D.Pa. September 4, 1997), indicate that, as a starting point, the owner/operator should bear 50% of the cost of the response at the Site. In the allocation attached to the EPA offer, there has been no share assessed to Chemcene, in spite of the fact that it is allowed to continue in operation and that it was operating in a way which did not comply with its permit. These operations not only impact Chemcene's liability, but affect the ultimate allocation among non-operating parties.

C. Amount of Liability

The Walter B. Satterthwaite Associates, Inc. ("WBSAI") report on response costs, which we provided to EPA, concluded that future response costs for the main plant area which were projected by the Proposed Plan overstated the amount which would likely be incurred for

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remediation of the main plant area. WBSAI projected that the costs EPA used for settlement exceed the likely cost by two-fold. When the allocation includes an amount which is 100% higher than the estimated cost should be, the higher amount is essentially a premium. In the proposed settlement, EPA then adds an additional 50% premium. For those companies with allocations only at the main plant area, the resulting premium is 200%.

A review of the former disposal area also indicates that the costs are dramatically overstated. We have not commissioned WBSAI to fully analyze those costs to determine by what factor those costs are overstated. We believe that the inflated disposal costs alone may lead to a two fold increase in projected costs.

Even assuming EPA's projections are correct, responses at the main plant area and at the former disposal area are sufficiently defined and a 50% premium is extraordinarily excessive. As we explained to you at the meeting last month, we believe that the "unknowns" can be sufficiently accomplished by a less than 10% premium.

D. Oversight Costs

Paragraph 15 reflects that EPA is recovering its oversight costs. As you know, these costs are not recoverable under United States v. Rohm & Haas. Therefore, a deduction should be made in the settlement amounts.

III. **DEFINITION OF COSTS**

The Group is also concerned that the definitions of "future" response costs", "past response costs" and "response costs" do not adequately reflect that those costs include amounts spent by parties other than the Environmental Protection Agency. There is a concern that the terms would be construed narrowly by others and would not to include amounts spent by Chemclene or any of the parties who elect to accept your offer to perform remediation. It is essential that any settlement include those costs.

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IV. DEFINITION OF "RESPONDENTS"

It appears likely that the Appendix "A" list of respondents will include far more companies than actually agreed to settlement. My clients wish to ensure that there is no confusion over which parties are settling parties and which elect not to settle. Please advise as to your intent regarding modifying the Appendix "A".

V. RESOURCE CONSERVATION AND RECOVERY ACT RELEASE

As you know, this site has been subject to a Resource Conservation Recovery Act ("RCRA") Consent Order and was originally a RCRA licensed treatment storage and disposal facility. Presumably, past costs incurred both by the State and by EPA would include costs incurred pursuant to the RCRA program. Therefore, my clients wish to modify several provisions of the Consent Order to reflect RCRA issues. These provisions include both the sections defining the amount which is being settled and those which provide contribution protection and a covenant not to sue.

VI. PAYMENT PROVISIONS

There is concern regarding the form and nature of settlement payments. Given the large number of parties solicited and the likely more limited response, it would be appropriate to add a provision in Section 8 stating that the failure of one party to pay shall not operate to void the Order. Those who agree to the settlement should not have to await payment by every other party prior to obtaining the covenant not to sue and contribution protection.

Additionally, a number of questions have been raised regarding the appropriateness of the stipulated penalties provisions. The only actions which are to be undertaken by the de minimis settlors are the payment of money. It is unreasonable to impose a daily penalty of a minimum of \$500.00 on parties whose entire liability is only slightly in excess of that amount. I would suggest deletion of any stipulated penalties. In their place, you should consider a cut off date on which all settling parties will have been identified and all others will be deemed to have rejected the offer.

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Additionally, Paragraph 21 requires that late payments are to bear interest. This is inappropriate if parties will be required to pay stipulated penalties. EPA should not require both interest on late payments and also a stipulated penalty for the same payment. This is compounded by Paragraph 26's proposed language allowing civil penalties to be assessed for failure to make timely payments. The three remedies - interest, stipulated penalties and civil penalties - are excessive for this type of settlement. The interest remedy is the only one which makes sense.

VII. EPA DETERMINATIONS

The language of Paragraph 13 should be modified to reflect that the allocation in the Exhibits is only EPA's assertion, rather than its determination, regarding the volume of each de minimis PRP. Paragraph 27, which deals with the parties maintenance of records, should also be reworded. Very few of the respondents will agree with EPA's determination of volume, nor state that they have no basis to alter the volumetric ranking as is set forth in that paragraph. Rather than the language at Paragraph 27.a., which discusses the parties having conducted a "thorough, comprehensive, good faith search for documents" and with a result that no documents exist which provide a basis to "alter the volumetric ranking summaries", I would suggest that the parties only certify that they have provided EPA with all documents in their possession relating to transactions at the Site. With regard to Paragraph 27.c., a number of the parties did not receive EPA's request for information and wording should reflect that those who did receive these requests have answered all pertinent questions.

VIII. COVENANT NOT TO SUE

Paragraph 29 allows EPA to sue a settling party if as few as one single transaction is discovered after the settlement. A more flexible provision should be inserted in the covenant not to sue. There should be a threshold increase in the allocated amount before the settlement is reopened due to newly discovered information. I suggest that we incorporate a standard which provides both a percentage and a volume. By way of example, EPA will not reopen the case against a company unless information is uncovered which increases the volume by 30% or 30 drums, which ever is greater. The 30% number alone is not sufficient for small volume parties.

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Therefore, I have suggested a 30-drum number for small parties who may be dramatically impacted by discovery of a new transaction.

IX. RESERVATION OF RIGHTS

There is concern that Paragraph 30.b may allow the United States to open up settlements if materials are removed from the Malvern Site and disposed at other locations. I do not believe it is the intent of Paragraph 30.b to allow EPA to bring action against de minimis parties for cleanup at these other facilities. Accordingly, an exception should be inserted for releases occurring at other facilities unless due to activities arising from the Malvern Site.

X. NATURAL RESOURCE DAMAGES

Obviously, my clients are concerned that there is no settlement for natural resource damages as is embodied at Paragraphs 30.d and 30.e. Please let me know if Interior is in the process of calculating any damages. My clients believe that, given the premium and the excessive amount of assumed response costs, any language which allows companies to be sued for natural resource damage is unwarranted.

With regard to liability for violations of federal or state laws, Paragraph 30.g should clearly state that the violations referred to are those that have been caused by the de minimis party's actions, rather than, for example, Chemcene's non-compliance.

XI. REOPENERS AT PARAGRAPH 31

I am also unclear as to the intent of Paragraph 31.a. regarding reopeners. Apparently, there will be no release given to a de minimis party which contributes more than .75% of the volume to the Site or if a party contributes materials having a disproportionate hazardousness. This language is unclear and could potentially impact any settlor. If the Government is currently satisfied that no party in Exhibit A contributed more than .75% or contributed more highly toxic materials, then EPA should be satisfied with the other reopeners if additional volumes are found. Please also note that Paragraph 31.b discusses inaccuracies in data. This issue is also dealt with in the certification section and is unnecessary at Paragraph 31.b.

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XII. COVENANT TO SUE BY RESPONDENTS

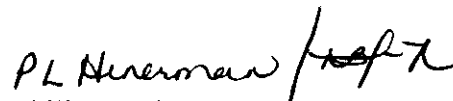
Paragraph 32.b. restricts the ability of the settling parties to sue the EPA or contractors. We wish to make it clear that the paragraph only applies to contractors retained by the United States and not to all contractors doing work in conjunction with EPA, such as those contractors doing work for Chemclene under the RCRA Consent Order.

XIII. WAIVER OF DEFENSE

Paragraph 37 appears to prohibit a settling party from asserting as a defense that claims against them were released by this Order. Please provide language which clarifies that this bar to asserting defenses does not affect the covenants not to sue.

We would appreciate the opportunity to meet representatives of EPA to discuss the settlement in more detail.

Sincerely,


Philip L. Hinerman

PLH:nbm
Attachment

cc: Frank Kearney, Esquire
Nora Gettliffe, Esquire

EXHIBIT "A"

- London Harness & Cable
- K-D Manufacturing/Danaher Tool Group
- Westinghouse Electric Corporation
- Deltron, Inc.
- Maida Development
- Mars Electronics, Inc.
- NAPP Chemical
- North Industrial Chemicals
- North Penn Polishing & Plating
- SKF Industries, Inc.
- Stein Seal Co.
- Superior Tube
- Valley Forge Tape & Label Co.
- Ametek, Inc.
- Anchor Darling Co.
- Brumbaugh Industries
- Chobert Associates
- Classic Coachworks
- Cobra Wire & Cable Co.
- Container Research Corp.
- Cook Specialty Company
- East West Label, Co., Inc.
- Electro Platers of York, Inc.
- Formosa Plastics
- Graphic Packaging Corp.
- John Evans & Sons, Inc.
- Alco Industries, Inc.
- Beemer Engineering Corp.
- CSS International
- R&E Martin Chemicals, Inc.